

**AN ORDINANCE AMENDING CHAPTERS 48 AND 11 OF THE
CITY CODE TO ESTABLISH A SOURCE WATER
PROTECTION AREA AND ADOPT CODE PROVISIONS TO
PROTECT DRINKING WATER IN THE BRANDYWINE
CREEK**

#3207

Sponsors:

Council
Members
Potter
Ignudo

WHEREAS, the State of Delaware Source Water Protection Law of 2001, 7 Del. C. §§ 6081-6084 requires that the City adopt as part of the City's Comprehensive Development Plan a map delineating a Source Water Protection Area (SWPA) on the Brandywine Creek upstream from the city's drinking water intake and raceway and to adopt code provisions to protect the SWPA from activities and substances that may harm water quality and subtract from overall water quantity; and

WHEREAS, this Ordinance is designed to protect the quality and quantity of the drinking water of Wilmington's citizens; and

WHEREAS, the City, the Delaware Water Resources Agency and the Delaware Department of Natural Resources and Environmental Control delineated the relevant watershed within the city limits and established the boundaries of the SWPA as shown on the SWPA Map, attached hereto as Exhibit "A"; and

WHEREAS, this Ordinance proposes to implement a new land use policy, regarding the proposed SWPA Map and proposed amendments to Chapters 11 and 48 as documented in the "City-Wide Plan of Land Use", a component of the City's Comprehensive Development Plan, and since the City Charter provides that any modification of the Comprehensive Development Plan requires a public hearing, 1 Wilm. C. (Charter) §5-600(a), City Council scheduled by separate Resolution, a public hearing regarding the Plan for the August 20, 2009 City Council Meeting; and

WHEREAS, this ordinance establishes the boundaries of the SWPA as shown on the attached Map, adds Division 4 to Article IX of Chapter 48, and amends Wilm. C. §48-511, and since any change to Chapter 48, the Zoning Code, requires a public hearing, Wilm. C. §

48-51, City Council scheduled by separate Resolution, a public hearing regarding this Ordinance for the August 20, 2009 City Council Meeting; and

WHEREAS, the City Planning Commission, at its regular meeting on August 18, 2009, will conduct a public meeting to review and to receive comment on the proposed amendment to the City-Wide Plan of Land Use, a component of the City's Comprehensive Development Plan relating to the Source Water Protection Area Map and related amendments to Chapters 11 and 48, and the Planning Commission subsequently will hold a public hearing to review and receive comment on the proposed amendments to Chapters 11 and 48, the Zoning Code, and after considering the proposed amendment to the City-Wide Plan of Land Use, and the amendments to Chapters 11 and 48, the City Planning Commission will make its recommendations; and

WHEREAS, the Wilmington City Code §§ 48-36(c) and 48-37(e) specifically apply to parcels within the SWPA and, following introduction of this Ordinance, a moratorium will be in place on issuance of building permits or certificates of occupancy within the SWPA until this ordinance is adopted, or until the expiration of 90 days, unless extended by Council Resolution; and,

WHEREAS, the City Council deems it necessary and proper to approve this Ordinance following review and recommendation by the City Planning Commission.

THE COUNCIL OF THE CITY OF WILMINGTON HEREBY ORDAINS:

SECTION 1. City Council hereby adopts the Source Water Protection Area Map dated November 2007, attached hereto as Exhibit "A", that delineates the relevant watershed of the Brandywine Creek within city limits upstream of the City's drinking water intake and raceway. The Mayor and City Clerk are hereby authorized and directed to approve the Source Water Protection Area Map as well as all additional undertakings related thereto, as may be necessary. In addition, upon the effective date of this Ordinance, the City Clerk, the

Director of Planning and the Zoning Manager are hereby directed to keep and file official copies of the SWPA Map in their respective offices.

SECTION 2. Chapter 48 - Zoning, Article IX - Supplementary Districts of the City Code is hereby amended by enacting a Division 4 entitled: "Source Water Protection Area Ordinance – Brandywine Creek upstream of the drinking water intake and raceway" as set forth herein:

Chapter 48 – ZONING, . . .

Article IX. – Supplementary Districts

Division 4. – Source Water Protection Area Ordinance - Brandywine Creek, upstream of drinking water intake and raceway

Sec. 48 – 437.1– Purpose and Intent

(a) Pursuant to the Delaware Source Water Protection Law of 2001, 7 Del. C. §§ 6081-6084, and consistent with the city's ongoing efforts to improve surface water quality, the city, with the assistance of the Delaware Department of Natural Resources and Environmental Control (DNREC) delineated a Source Water Protection Area (SWPA) within the city limits for the Brandywine Creek, the city's source of drinking water, and created a SWPA Map which was adopted as part of the City's Comprehensive Plan. Parcels within the SWPA shall be subject to this division which is designed to protect the SWPA, a Critical Area, from activities and substances that may harm water quality and subtract from overall water quantity. The SWPA includes two sub-categories with more stringent water quality and quantity protection requirements: (1) SWPA Subcategory A - Erosion Prone Slopes; and, (2) SWPA Subcategory B - 200 Foot Creek Buffer from the bank of the Brandywine Creek. Tax parcels located within the SWPA must meet the requirements of the relevant zoning district and must also comply with the SWPA requirements and prohibitions. If there is an inconsistency between the zoning district and SWPA requirements, the higher standard shall govern, consistent with city code section § 48-4.

(b) The SWPA Map may be amended from time to time as deemed scientifically appropriate by the Department of Public Works and DNREC and as approved by the Planning Commission and adopted by City Council. (***)Cross reference – 7 Del. C. § 6082(b))

Sec. 48-437.2 – Scope and applicability; effective date

(a) This division is prospective. All non-conforming conditions to this particular division in existence at the time the ordinance is adopted may continue in the form in which the condition existed at the time of the adoption of this division. Any formal application for New Development that has been submitted to any city department, commission or board for approval prior to the adoption of the ordinance may proceed and not trigger applicability of this division.

(b) Any existing or future condition which poses a direct hazard to the city's water supply, as determined by the city upon advice from the Delaware Division of Public Health, or is causing some foreign substance (oil, salts, chemicals or other substances) to be introduced into the city's water supply, as determined by the city upon advice from DNREC's Division of Air and Waste

Management and/or Division of Water Resources, the city shall issue a cease and desist order to stop the offending activity.

(c) For parcels located within the SWPA any application for New Development to the city, county, state or the federal government triggers applicability of this division.

(d) This division is effective upon adoption.

Sec. 48-437.3 - Source Water Protection Area requirements

(a) Source Water Protection Area Requirements

(1) **Underground Storage Tanks Prohibited.** – Installation of an underground storage tank (UST), as defined by Delaware Code, Title 7, Chapter 74, Delaware Underground Storage Tank Act, is prohibited in the SWPA. However, the replacement of existing underground storage tanks is permitted provided all state and federal regulations are met and secondary containment is provided. In the event of an existing UST failure or UST abandonment, the city may require replacement of the UST with an aboveground storage tank.

(i) Exemptions:

A. Any UST less than 110 gallons or residential UST less than 1,100 gallons containing heating fuel. A residential UST is a UST located on a single family or two-family property used primarily for dwelling purposes. (**Cross reference – 7 Delaware Administrative Code 1351, Delaware Regulations Governing Underground Storage Tank Systems.)

(2) **Aboveground Tanks Prohibited.** Installation of an aboveground storage tank (AST), as defined in Delaware Code Title 7, Chapter 74A, The Jeffrey Davis Aboveground Storage Tank Act, is prohibited in the SWPA.

(i) Exceptions:

A. Aboveground storage tanks used in the process of public water supply and treatment and public sewage treatment.

B. The replacement of existing aboveground storage tanks shall be permitted, provided all state and federal regulations are met and secondary containment is provided.

C. Aboveground storage tanks used solely to store propane gas.
(**Cross reference – 7 Del. C. §7404A(a)(2)).

D. Aboveground storage tanks of 1,100 gallons or less in capacity used solely to store heating fuel for consumptive use on the premises where stored.
(**Cross reference – 7 Del. C. §7404A(a)(3)).

E. Aboveground storage tanks installed on a temporary basis, not to exceed six (6) months. (**Cross reference – 7 Del. C. §7404A(a)(5)).

(3) **Hazardous Waste Treatment, Storage and Disposal Facilities Prohibited** – The on site treatment, storage or disposal of hazardous waste, as defined by the federal Resource Conservation Recovery Act, 42 U.S.C. §§ 6901-6992k, or 7 Delaware Administrative Code 1302, Delaware Regulations Governing Hazardous Waste, is prohibited.

(4) **New Development shall comply with DNREC's Permanent Stormwater Management Water Quality Controls** – New Development disturbing greater than 5,000 square feet must comply with Delaware's Sediment and Stormwater Regulations, dated October 11, 2006, or

as later revised, and, in particular, Section 10, "Specific Design Criteria and Minimum Standards and Specifications", specifically including, but not limited to, Section 10.3, "Specific requirements for the permanent storm water management portion". At the discretion of the Commissioner of Public Works, connecting to the city's combined sewer system may be an option to meet this requirement. Direct stormwater discharge to the Brandywine Creek or any of its tributaries is prohibited without pretreatment for water quality and water quantity improvement in compliance with Section 10.3 of Delaware's Sediment and Stormwater Regulations.

i. Exemption: Certified Brownfields

(5) **Filling of Wetlands Prohibited** – Filling of wetlands, as defined by the State of Delaware and the Army Corps of Engineers, is prohibited regardless of the size of the wetland.

(6) **Parking Lots** - All parking lots must comply with § 48-437.3(a)(4) regardless of the size of the parking lot even if the New Development disturbs less than 5,000 square feet.

(7) **Government owned parks and open space**. New Development that disturbs more than 1,000 square feet must comply with § 48-437.3(a)(4) of this division and is prohibited without prior approval from the Commissioner of Public Works.

(b) **Subcategory Level A - Erosion Prone Slopes**

(1) **Comply with all requirements of § 48-437.3(a)**

(2) **Comply with Erosion Prone Slopes practices**. New Development on Erosion Prone Slopes as identified on the SWPA Map must comply with the following practices:

i. No other alternative location within the New Development being considered is feasible or practical.

ii. Removal of or disturbance to existing vegetation on the parcel shall be minimized. The proposed impacts on existing vegetation shall be evaluated in terms of the potentially detrimental effects on slope stability, recharge of stormwater and existing drainage patterns.

iii. Roads and driveways shall only be permitted if no viable alternative alignment or location is feasible, provided that such roads and driveways are aligned predominately parallel to the contours.

iv. All earth work shall be conducted so as to be concluded one (1) month prior to the end of the planting seasons (i.e., April 30 and September 30). This practice will enable a ground cover to be established after work completion.

v. A ground cover shall be placed on all exposed surfaces prior to the end of the planting season, or as the work is completed prior to that date. The city is authorized to permit temporary cover in limited situations where unusual weather or the type of New Development requires earth work beyond a planting season. Surety may be required for remedial work if temporary cover is to be used.

vi. All erosion prone slopes exceeding fifteen (15) percent or where water flows can be anticipated shall have a protective cover to hold the seed or plants in place.

(c) Subcategory Level B - 200 Foot Buffer from bank of Brandywine Creek

(1) Comply with all requirements of § 48-437.3 (a)

(2) Filling of 100 Year Floodplain Prohibited. No approval shall be granted by the Zoning Board of Adjustment permitting the raising of elevation of the land on the 100 year floodplain.

i. Exemption: Paths or walkways open to the public in perpetuity.

(3) Underground Storage Tanks Prohibited. – Installation of an underground storage tank (UST), as defined by Delaware Code, Title 7, Chapter 74, Delaware Underground Storage Tank Act, is prohibited regardless of size.

Sec. 48-437.4 – Administrative Rules. The Department of Planning, the Department of Public Works, and the Department of Licenses and Inspections may draft rules as deemed necessary regarding implementation of this division subject to review and approval by the Administrative Board.

Sec. 48-437.5 – Administration, Enforcement, and Penalties.

- (a) The relevant departments shall administer and enforce the provisions of this division under the authority of each respective department.
- (b) Penalties for non-compliance with this division shall be issued consistent with relevant penalty provisions of the City Code or under § 48-31.

Sec. 48 – 437.6- Variance or Waiver Request. If any requirement or prohibition of this division causes unnecessary hardship or exceptional practical difficulty to a property owner a variance or waiver request may be submitted in writing by the property owner to the Zoning Board of Adjustment (“ZBA”) consistent with city code section 48-70. Such submittal must include a mitigation plan where appropriate. Any variance or waiver request to the ZBA must also be submitted to the Commissioner of License and Inspections who, after consultation with the relevant city department head, will make a recommendation to the ZBA regarding approval or denial of the variance or waiver request.

Sec. 48 – 437.7 – Severability Clause. The provisions of this section are specifically made severable in accordance with the general severability provisions of section 1-9 of the City Code.

Sec. 48 – 437.8 – Definitions. The following words, terms and phrases, when used in this Division, shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) *Aboveground storage tank* or AST as defined by The Jeffrey Davis Aboveground Storage Tank Act, 7 Delaware Code Chapter 42A, and Delaware Regulations Governing Aboveground Storage Tanks.

(b) *Brownfields.* Means any vacant, abandoned or underutilized real property the development or redevelopment of which may be hindered by the reasonably held belief that

the real property may be environmentally contaminated.

(***Cross reference - 7 Del. C. § 9103(3))

(c) *Certified Brownfields*. Means a brownfield, as defined in 7 Del. C. § 9103(3), that the Secretary of the Delaware Department of Natural Resources and Environmental Control has certified pursuant to the regulations governing hazardous substance cleanup.

(***Cross reference - 7 Del. C. § 9123(3))

(d) *Critical Area*. Means an area wherein the establishment or maintenance of a viable physical, economic or social environment is of more than local concern; or the physical, economic or social characteristics of said area are of primary importance or uniquely sensitive, including, but not limited to, wetlands, major port facilities and historic areas.

(***Cross reference - historic definition pursuant to 29 Del. C. § 9202, repealed in 2003.)

(e) *Erosion Prone Slopes*. Erosion Prone Slopes, SWPA Subcategory A, are delineated in the SWPA Map and are contiguous to, and draining toward, the 100 year flood plain or water course and consist of land with soils of United States Department of Agriculture Soil Conservation Service capability classifications IVe, VIe, VIs, and VIIe as mapped by the Soil Survey of New Castle County (1970).

(f) *Land Disturbing Activity*. Means any land change or construction activity for residential, commercial, industrial and institutional land use which may result in soil erosion from water or wind or movement of sediments or pollutants into state waters or onto lands in the State, or which may result in accelerated stormwater runoff, including, but not limited to, clearing, grading, excavating, transporting and filling of land. This definition does not apply to commercial forestry practices.

(***Cross reference - Title 7 Delaware Code, Chapter 40 - Erosion and Sedimentation Control, §4002(3)).

(g) *New Development*. Any land use change to a parcel, including but not limited to:

- (1) Minor or major subdivision
- (2) Building permit application
- (3) Demolition permit application
- (4) Grading permit application
- (5) Application for floodplain variance
- (6) Application for underground or aboveground storage tank permit.
- (7) Application to dredge or fill wetlands
- (8) Any land disturbing activity, as defined in 7 Del. C. § 4002, greater than 5,000 square feet, triggering a sediment and stormwater management plan requirements pursuant to city code section 11-38.
- (9) Application for an encroachment permit for alteration and/or modification of the stream bank.

(h) *Parking Lot*. For the purposes of this division only, parking lot is defined to mean any commercial parking lot or parking lot that is an accessory use.

(i) *Source Water* - Shall mean any aquifer or surface water body from which water is taken either periodically or continuously by a public drinking water system for drinking or food processing purposes. (***Cross reference - Title 7 Del. C. §6002(65)).

(j) *Source Water Protection Area (SWPA)* - Shall mean the delineated area which contributes water to a public supply system. This is called a watershed or basin for a surface water intake. A Source Water Protection Area shall constitute a Critical Area as historically defined under Chapter 92, Title 29 of the Delaware Code.

(***Cross reference - "Source Water Assessment Area" 7 Del. C. §6002(66)).

(k) *Underground storage tank* – As defined by the Delaware Underground Storage Tank Act, 7 Delaware Code, Chapter 42, and 7 Delaware Administrative Code 1351, Delaware Regulations Governing Underground Storage Tank Systems.

(l) *100 Year Floodplain* – Means the land area subject to a probability of flooding at least once in 100 years. For purposes of the SWPA and this Code, the identified floodplain area shall be those areas of the city which are subject to the 100-year flood as shown on the floodway map or flood insurance rate map (FIRM) and described in the flood insurance study (FIS) prepared for the city by the Federal Emergency Management Agency (FEMA), dated April 17, 1996, or the most recent revision thereof.

[Sec. 48-38 to 48-40 Reserved]

SECTION 4. Chapter 48 - Zoning, Article XI - Supplementary Regulations, Division 3 – Parking Lots, Subdivision I – General Provisions, Section 511 – General Requirements, an existing provision in the City Code, is hereby amended as set forth herein as part of the Source Water Protection Area Ordinance:

Chapter 48 – ZONING

Article XI. - Supplementary Regulations

Division 3. – Parking

Lots

Subdivision I. General Provisions

Section 48-511. General requirements. A parking lot and individual parking spaces in any district, whether in the form of any parking space accessory to a one-family or a two-family dwelling, parking spaces accessory to a dwelling for more than three families, or accessory to any nonresidential use, or in the form of a commercial parking lot, shall conform to the following special provisions:

(1) All areas devoted to access driveways or roadways, maneuvering areas and parking berths, pads or spaces shall be paved with materials which form an all-weather ~~impervious~~ surface and shall be properly drained to a sewer or properly managed at the discretion of the Commissioner of Public Works;

[. . .]

SECTION 5. Chapter 11 – Environment, is hereby amended by enacting an Article IV – “Source Water Protection Area – Brandywine Creek, upstream of drinking water intake and raceway” as set forth herein:

Chapter 11. – Environment. . .

Article IV. – Source Water Protection Area – Brandywine Creek, upstream of the drinking water intake and raceway

[Sec. 11-68 to 11-99 Reserved]

11 - 100 Scope. This Article applies only to the Source Water Protection Area as defined by Chapter 48 Zoning, Article IX, Division 4, Source Water Protection Area Ordinance – Brandywine Creek, upstream of drinking water intake and raceway.

11-101 Snow and ice removal

- (a) It is prohibited to place snow or ice from plowing or shoveling in the Brandywine Creek, any other surface water body or the city's drinking water raceway.
- (b) Conditions permitting, City and Delaware Department of Transportation snow and ice removal operations shall utilize materials and techniques to protect water quality.

11 - 102 Government owned parks and open space.

- (a) Employ environmentally sensitive land management techniques.
- (b) Where appropriate, comply with USDA Natural Resources Conservation Service – Delaware Conservation Practice Standards for Riparian Forest Buffer, Code 391, May 2001, or as amended in the future.

11 - 103 Administrative Rules. The Department of Public Works may draft rules as deemed necessary regarding implementation of this article subject to review and approval by the Administrative Board.

SECTION 6. Effective date. This Ordinance shall be deemed to be effective immediately upon its date of passage by the City Council and approval by the Mayor.


First Reading July 9, 2009

Second Reading July 9, 2009


Third Reading August 27, 2009

Passed by City Council,
August 27, 2009

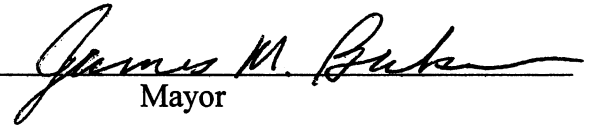

President of City Council 8/27/09

ATTEST: 
City Clerk

Approved as to form this 9th
day of July, 2009.


Senior Assistant City Solicitor

Approved this 28th day of August 2009


Mayor

SYNOPSIS: This Ordinance is enacted pursuant to the State of Delaware Source Water Protection Law of 2001, which requires that the City delineate a Source Water Protection Area (SWPA) on the Brandywine Creek upstream from the City's drinking water intake and raceway and protect this Source Water Protection Area from activities and substances that may harm water quality and subtract from overall water quantity through adoption of proposed amendments to Chapters 48 and 11 of the City Code.

